MANILAL & SONS PTE. LTD.

v.

BHUPENDRA KUMAR J. SHAN

HIGH COURT, SINGAPORE
CHAO HICK TIN J
[SUIT NO. 2297/81]
1 DECEMBER 1989

CIVIL PROCEDURE: *Discovery - Claim by plaintiff basis of claim - Partnership trading business - Claim disputed by defendant - Order of Court for inspection of documents - Order 25 Rules of the Supreme Court - Allegation by defendant that plaintiff has refused to furnish crucial documents - Incomplete discovery - Compliance with r. 16(1) Rules of Supreme Court 1980 [Sing] - Powers of the Court.*

The plaintiffs brought an action against the defendant for a sum being the balance due from the defendant to the plaintiff for goods sold and delivered and for commission and for certain partnership trading business in rubber and latex.

Following a summons for directions made under O. 25 of the Rules of the Supreme Court 1980, the Court on 20 January 1984 ordered that each party served on the other within 21 days a list of documents and file an affidavit verifying the same. The Court also ordered inspection of documents within 14 days of the service of the list.

The defendant now applies to strike out the plaintiff's claim.

The basis of the application is that despite repeated requests, the plaintiffs have referred and give discovery of a large number of crucial documents which the defendant says the plaintiff must furnish under the order of Court of 31 August 1987.

Held:

[1] There is clearly a withholding of category (h) documents on the part of the plaintiff.

[2] There is quite clearly a dispute as to the terms of the partnership arrangements and also a dispute on whichs transactions are partnership transactions and which are not. In the circumtances, the documents allegedly relating to the plaintiffs own business are in issue and should be disclosed.

[3] Under the order of 31 August 1987, the plaintiffs must make full discovery. Whether a document is explicitly identified in the order is quite immaterial. The crucial factor would be relevancy.

[4] The plaintiffs have not made the necessary full and fair discovery, particularly as regards the documents in categories (a), (e), (f) and (h). There has been non-compliance with the order.

[5] Even if the omission had not been deliberate then it arose out of gross negligence on the part of the plaintiffs such as to amount to wilfulness.

[Application allowed.]

Cases referred to:

Compagnie Financiers du Pacifique v. Peruvian Guano Co. [1882] 11 QBD 55
Merchants' & Manufacturers' Insurance Co. Ltd. v. Davies [1938] 1 KB 196
Danvillier v. Myers [1883] WN 58
Kent Coal Concessions v. Duguid [1910] 1 KB 904

For the plaintiff - M. Karthigesu
For the defendant - Shanmuggam (Yap Wai Ming with him)

JUDGMENT

Chao Hick Tin J:

In this action the plaintiffs claim the sum of $892,611.77 being the balance due from the defendant to the plaintiffs for goods sold and delivered and for commission and for certain partnership trading business in rubber and latex.

Soon after the institution of this action an application was made by the plaintiffs for summary judgment. This was refused by the Deputy Registrar who granted unconditional leave to defend. The plaintiffs appealed to the Judge-in-chambers, who affirmed the decision of the Deputy Registrar.

In the amended defence filed herein the defendant avers that, subject to certain specified items, the goods allegedly sold and delivered to the defendant were, in fact, never so sold and delivered. The defendant also alleges fraud. In regard to the claim relating to the partnership business in rubber and latex, the defendant counter-claims against the plaintiffs for moneys due to him in accordance with an oral agreement entered into between the parties in May 1976. In short, there is considerable dispute between the parties as regards partnership accounts as well as the accounts relating to the goods allegedly sold to the defendant.

Following a summons-for-directions made under O. 25 of the Rules of the Supreme Court 1980, the Court on 20 January 1984 ordered that each party served on the order within 21 days a list of documents and filed an affidavit verifying the same. The Court also ordered inspection of documents within 14 days of the service of the list.

On 26 August 1987 the defendant filed his list of documents and also made an application by way of summons-in-chambers (No. 5845/87) asking for, *inter alia*, an order that the plaintiffs comply with the order of Court of 20 January 1984 and that the defendant and such public accountants as might be nominated by the defendant be allowed access to all of the documents in the plaintiffs' list of documents. In his affidavit filed in support of this application, the defendant stated that:

(i) the balance sheets, upon which the plaintiffs based their claims, were not true and were deliberately drawn up to reflect artificial balances in favour of the plaintiffs;

(ii) there was an agreement between the plaintiffs and the defendant that neither party would rely on the balance sheets and that the true accounts would be worked out later;

(iii) that if the true accounts were examined it would be seen that goods which were claimed to have been sold to the defendant were never sold; and

(iv) that the partnership business in rubber and latex should have shown a profit instead of a loss.

In the affidavit, the defendant expressly asked the plaintiffs to disclose certain primary documents for the period 1976 - 1980, and he gave his reasons why he needed those documents. The documents were: cash books, ledger books, bank credit/debit notes, sale contract files, purchase contract files, local sale bills and invoice books. The defendant said that he needed these documents to counter-check the plaintiffs' claim and to show that the claims could not be true - in the words of the defendant's accountant, they require "access to Manilal's books, and original contracts and invoices in order to determine the source of goods and their ultimate disposal.

On 27 August 1987, the plaintiffs filed their list of documents (in compliance with the order of Court of 20 January 1984) and an affidavit verifying the same. On 31 August 1987, when the application of the defendant in summons-in-chambers no. 5845/87 came up, that became an application whether to order a further and better list of documents. After hearing the parties, the Court ordered, *inter alia*, that:

1. The plaintiffs do comply with the order of Court dated 20 January 1984 by filing a further list of documents and verifying the same by affidavit by 28 September 1987.

2. In default of compliance with para. one by the plaintiffs, the plaintiffs' action herein be struck off.

A year later on 21 September 1988, the defendant applied by summons-in-chambers for, *inter alia*, an order that the plaintiffs' action herein "be struck out for failure or refusal by the plaintiffs to give proper discovery of documents in or which have been in the possession, custody or power of the plaintiffs ... relating to the matter in question in the action." The defendant also applied for an order to enter judgment on the counter-claim against the plaintiffs but this is not seriously pursued. The application to strike out the plaintiffs' action is the matter now before me.

The basis of this application to strike out is that despite repeated requests, the plaintiffs have refused to give discovery of a large number of crucial documents which the defendant says the plaintiffs must furnish under the order of Court of 31 August 1987.

Background to the Present Application

To better appreciate the issues before me, it may be necessary that I briefly set out the background facts that gave rise to the present action between the parties. For a period of four years from May 1976 to May 1980 the parties were in partnership, and the business of the partnership was to trade in rubber and latex. In this regard the defendant says only in physical rubber and latex. They were also, it would appear, trading with each other in various other commodities and, according to the defendant, also in partnership. Between May 1976 until the end of 1978, an associate company of the plaintiffs, Manilal and Sons (M) Sdn. Bhd. of Penang, also participated in the partnership to trade in rubber and latex.

The plaintiffs say that the partnership's trading in rubber and latex for the period 1 January to 31 May 1980 made a loss, resulting in there being as on 31 May 1980 a net sum of $113,271.41 due from the defendant to the plaintiffs. The other main head of claim is for a sum of $779,340.35, being the balanced amount due to the plaintiffs for goods sold and delivered to the defendant and for commissions and other charges. The plaintiffs rely on the accounts as set out in certain balance sheets which were signed by the parties.

The defendant denies that the partnership business in rubber and latex suffered any loss. The defendant says that if the accounts and primary documents/books are looked into, it will be discovered that the partnership ventures actually made profits. The defendant also says that the balance sheets are not correct and were deliberately drawn to show artificial balances in favour of the plaintiffs. As stated above, the defendant alleges that there was an agreement between the parties not to rely on the balance sheets and, except for certain specifically admitted goods, the defendant says that no goods were actually sold and delivered by the plaintiffs to him. In fact for the two balance sheets dated 2 June 1980, the defendant had specifically qualified the accounts by stating that they were "subject to verification".

Differences arose between the parties as to the kind of documents that should be discovered pursuant to the order of Court of 20 January 1984. The defendant took the view that under that order and under general law, both parties were obliged to give discovery of all relevant documents in their control, custody, etc, in so far as the same had a bearing on their business relationship between 1976 and 1980. The defendant said that every document, contract note, bank document, invoice (i.e., primary documents) which related to the trading transactions of the partnership or which would show whether a transaction was a partnership transaction or a transaction entered into by the plaintiffs on their own account would be relevant and should be produced.

The plaintiffs on the other hand felt that the primary documents were not discoverable though they did disclose in the first list of documents certain primary documents for the period January to June 1980 plus the correspondence between the solicitors for the parties and the balance sheets.

By the order of Court of 31 August 1987 the plaintiffs were required to file a supplementary list. The supplementary list was filed on 25 September 1987 and therein the plaintiffs set out numerous primary documents for the years 1976 to 1980. The supplementary list also stated that certain documents could not now be traced and the plaintiffs did not know what have become of them.

Notwithstanding the further list, the defendant contended that the plaintiffs had not given full discovery. The defendant said that not only must the plaintiffs produce documents which showed that they had entered into various contracts, they must also produce documents to show whether those were partnership contracts or contracts entered into by the plaintiffs on their own account. The defendant claimed that throughout the material period there were partnership transaction and there were transactions which the plaintiffs entered into on their own account. This was not denied by the plaintiffs. It was important that these two categories of transactions be differentiated in order to arrive at the true state of accounts between the parties. Following further correspondence between the solicitors for the defendant and the plaintiffs, a second supplementary list and an affidavit were on 20 June 1989 filed by Mr. N.S. Patel on behalf of the plaintiffs.

Nevertheless, on 23 August 1988, the defendant's solicitors wrote to the plaintiffs' solicitors stating that the discovery was not complete. This was because the documents actually disclosed by the plaintiffs referred to other important documents which would help verify the defendant's defence. The defendant's solicitors in that letter identified the following 15 categories of primary documents which should have been produced:

Item 1: Documents in Plaintiffs' Possession

(a) Local purchase contract files for the years 1976 to 1980 in respect of rubber, latex and general goods.

(b) Overseas buyers contract files for the years 1976 - 1980 in respect of rubber and latex.

(c) Foreign exchange contract files for the years 1976 - 1980 in respect of rubber and latex.

(d) Invoice books relating to plaintiffs' general export for the years 1976 - 1980.

(e) All plaintiffs' stock books/records showing plaintiffs' inventory between 1976 - 1980.

(f) Local sales bill files for 1976 - 1980 in respect of rubber and latex.

(g) Claims received files on rubber and latex for 1976 - 1980.

(h) Rubber hedging contracts which plaintiffs entered into with all brokers between 1976 - 1980.

Item 2: Documents of Manilal of Sons (M) Sdn. Bhd.

(i) Foreign exchange contract files for 1976 to 1978.

(j) Local purchase contract files for 1976 - 1978.

(k) Overseas sales contract files for 1976 - 1978.

(l) All shipping documents and related vouchers for 1976 - 1978 including those documents relating to freight and insurance premium paid.

(m) Cash books for 1979 - 1980.

(n) Bank statements for 1979 - 1980.

(o) General ledger for 1979 to 1980.

The plaintiffs were also requested by the defendant to produce the said documents without delay and to take out an application to extend time for compliance with the order of Court of 31 August 1987.

In their reply of 26 August 1988, the plaintiffs' solicitors explained that the problem was "there are such a volume of documents which are in the nature of supporting or ancillary documents that it is almost impossible to list every single one." Having said that, the letter went on to state:

> it is our contention that every single document has been listed out in the affidavit we have filed. If by some chance a voucher or receipt or an ancillary document has been inadvertently omitted and you can point out the omission we will request our clients to track it down and to produce it to you if it exists. We cannot in the circumstances do more than that. We have taken note of the further documents you want produced as listed in your letter under reference. These will be made available on Monday, 29 August and on the days following.

Further correspondence took place between the solicitors of the parties. In the letter of 5 September 1988, the plaintiffs' solicitors stated that:

> the further documents requested by your client are presently in warehouse storage and much time will have to be spent in tracing those said documents in storage before they can be furnished to your clients for inspection. It is presently not certain whether the further documents requested by your clients are still in our clients' possession.

Then came the very crucial letter of 6 September 1988 of the plaintiffs' solicitors and I think I ought to set it out in full:

> With regard to the documents listed under item 1 our clients' instructions are as follows:
>
> (a) We are instructed that the primary documents requested by your clients are in fact with your clients. We are further instructed that these documents emanated from your clients. Our clients accordingly do not have any of the documents requested by you.
>
> (b) Our clients do not have any of the documents requested by your clients.
>
> (c) We are instructed that the original primary documents requested by your clients are in fact with your clients. Our clients do however have copies of the foreign exchange contracts for the year 1978 which have already been provided to your clients for inspection.
>
> (d) Our clients only have invoice books for the years 1978, 1979 and 1980 which have already been provided to your clients for inspection.

(e) Our clients do not have any of the documents requested by your clients as they bought and sold FOB.

(f) We are instructed that the originals of the documents requested by your clients are with them.

(g) Our clients do not have any of the documents requested by your clients.

(h) Our clients do not have any of the documents requested by your clients and we are further instructed that the originals of the documents requested by your clients are in fact with them.

Of the documents requested under item 2 of your said fax we have instructions to inform you that a request has been made of Manilal & Sons (M) Sdn. Bhd. for the provision of the documents requested by your clients and as soon as the same are received in Singapore they shall be provided for inspection.

On 12 September 1988, the plaintiffs' solicitors wrote to say that Manilal & Sons (M) Sdn. Bhd. had lodged the following documents for the defendant's inspection:

(i) Local purchase contract files for 1976 - 1978;

(ii) Overseas sales contract files for 1976 - 1978;

(iii) Shipping documents files containing bills of lading and insurance paid:

(iv) Cash books for the year 1979; and

(v) General ledger for 1979 to 1980.

However, with regard to the other items listed in the defendant's solicitor's letter of 23 August 1988, the plaintiffs' solicitor stated that "we have instructions to inform you that our clients do not have the original of such documents in their possession.

By a letter dated 16 September 1988, the defendant's solicitors gave reasons why they thought the documents requested must have existed and were in the possession of the plaintiffs. The plaintiffs were given until 19 September 1988 to comply. It would appear that letter of 16 September 1988 was received by the plaintiffs' solicitors on that day at 10.45 a.m. As Mr. Anand Karthigesu, who was in charge of the matter, was going on leave on 17 September 1988, he was not able to attend to it. Mr. M. Karthigesu had sight of the letter only on the morning of 19 September 1988 and thus asked for more time for compliance. It was only at 3 p.m. on 26 September 1988 that Mr. M. Karthigesu, together with the plaintiffs' auditors, saw their client.

In the meantime, and as stated above, the present application to strike out the action of the plaintiffs for non-compliance with the order of Court of 31 August 1987 was taken out on 21 September 1988.

Response of the Plaintiffs to the Application

In an affidavit filed on 4 October 1988 by Mr. N.S. Patel to resist the application, the plaintiffs explained:

As was to be expected when a very large number of documents are retrieved from storage, some from Penang and some from Singapore, and presented for inspection at offices in Singapore some of the documents presented for inspection were not easily traceable. Further in the course of transporting the documents from Penang some were inadvertently left behind.

Mr. Patel also went on in that affidavit to state that:

> The plaintiffs have disclosed and given inspection of all documents in their possession, custody or power relating to any matter in question in this action and that neither the plaintiffs nor their solicitors nor any person on their behalf have now or ever had in their possession, custody or power any documents of any description whatever relating to any matter in question in this action other than the documents enumerated or described in the Schedule to the lists of documents filed herein on 27 August 1987, 25 September 1987 and 20 June 1988.

The plaintiffs said that the partnership to trade in rubber and latex was formed because the defendant and the plaintiffs complemented each other. The defendant had the expertise and the plaintiffs the finance. It was defendant who was responsible for putting together a transaction from beginning to end, covering negotiations, procuring supplies, making foreign exchange contract, arranging shipment and attending to claims. When the defendant had put through a transaction he would present to the plaintiffs a complete set of documents with his endorsement on the first page signifying that he had checked and approved the documentation. The plaintiffs would then sign and forward the documents to the bank for finance to be provided.

The plaintiffs further clarified that prior to the formation of the partnership, the defendant's own business and contracts in rubber and latex were with "main ports" i.e., United Kingdom, United States and Europe. The partnership business was carried on the same basis. The defendant would enter into a contract with a local supplier to purchase rubber for shipment to a "main port". Although the contracts were invariably in the name of and signed by the plaintiffs, the plaintiffs said they never retained the contracts or copies thereof. However, the plaintiffs did admit that they had on their own account transacted a small volume of business in rubber and latex with "odd ports" i.e., Middle East, Africa, Canada and South America. This, according to the plaintiffs, was how partnership contracts in rubber and latex were differentiated from the similar business transacted by the plaintiffs on their own account.

In the affidavit of 4 October 1988, Mr. N.S. Patel gave these answers (and these are very much the same answers as conveyed in the plaintiffs' solicitors' letter of 6 September 1988) to the eight categories of documents which the defendant's solicitors requested under item 1 in their letter of 23 August 1988:

(a) **Local purchase contract files**

Answer: Not in the possession of the plaintiffs. In fact in the possession of the defendant.

(b) **Overseas buyers contract files**

Answer: Not in the possession of the plaintiffs.

(c) **Foreign exchange contract files**

Answer: In fact in the possession of the defendant but plaintiffs have in their possession copies of the foreign exchange contracts for the year 1987 which have already been produced to the defendant.

(d) **Invoice books for plaintiffs' general export.**

Answer: Plaintiffs have in their possession only the invoice books for 1978, 1979 and 1980 which have already been produced ... a substantial proportion of the plaintiffs' accounting documentation for the year 1977 was damaged or destroyed by rain during the plaintiffs' move from their old premise s...

(e) **Plaintiffs' stock books/records showing inventory**

Answer: Plaintiffs do not have any such documents as the plaintiffs bought and sold FOB.

(f) **Local sales bill files**

Answer: ... the originals of the documents ... are with them ... if by this request the defendant is referring to the plaintiffs' sales to him, the said files have been disclosed and inspection given.

(g) Claims received files on rubber and latex

Answer: Not in the possession of the plaintiffs.

(h) Rubber hedging contracts

Answer: Not in the possession of the plaintiffs. In fact in the possession of the defendant.

On "Rubber hedging contracts" Mr. Petal also admitted in his affidavit that the plaintiffs did on their own account enter into rubber hedging contracts but had exclusively used Lewis & Peat for this purpose. To his knowledge, the plaintiffs had not, in relation to plaintiffs' own account, entered into rubber hedging contracts with brokers such as Bee Rubber Co. Pte. Ltd., Hock Tong Rubber Brokers Pte. Ltd., Malaysia Brokers Pte Ltd. and Union Rubber Pte. Ltd. Mr. Patel said that the rubber hedging contracts which the defendant entered into the partnership were concluded in a similar manner as for the purchase and sale of physical rubber and latex described above.

At this juncture I ought to observe that the plaintiffs have not, prior to the date of hearing before me, denied that the eight categories of documents requested by the defendant are relevant.

Oral Examination of Plaintiffs' Deponent

For the purpose of determining the application before me, both parties agreed that Mr. Patel be cross-examined on the facts deposed to in his affidavits, particularly that of 4 October 1988. He was also re-examined by the plaintiffs' own Counsel. The position that emerges from the oral examination with regard to the eight categories of document is as follows:

(a) **Local purchase contract files in respect of rubber and latex and general goods.**

The plaintiffs concede that while the plaintiffs have produced the purchase bills relating to the partnership business, the plaintiffs have not produced purchase bills which the plaintiffs allege relate to the plaintiffs' own business. However, the plaintiffs indicated that they are prepared to produce the same to the defendant's solicitors and auditors. Mr. Patel admitted that if the purchase bills were produced they would show whether a particular transaction was FOB, transhipment or local sales and whether the sales were to the defendant. He also agreed that based on the purchase bills, the defendant would be able to distinguish between partnership transactions and those which were not.

(b) **Overseas buyers contract files in respect of rubber and latex.**

Mr. Patel confirmed what he stated in his affidavit that the partnership business in rubber and latex was with main ports, i.e., Europe and United States. The plaintiffs' own business in rubber and latex was with odd ports and the quantity was not significant. He said that that was the basis upon which he differentiated whether a transaction was that of the partnership or that of the plaintiffs' own. Mr. Patel admitted that the documents relating to the plaintiffs; own business have not been disclosed because they have nothing to do with the partnership business and the plaintiffs would be prepared to disclose them if ordered by the Court. However, in cross-examination it was shown by Counsel for the defendant that this distinction is not really valid because two shipments to odd ports had been reflected as partnership

transactions and a shipment to a main port had not been reflected in the partnership accounts. During re-examination, Mr. Patel tried to explain the discrepancy by saying that though rubber was shipped to odd ports, the transactions were nevertheless partnership business because the contracts were negotiated in London and were treated as main-port contracts. But even on this basis it has been shown that there is no consistency.

(c) **Foreign Exchange Contracts in respect of rubber and latex**.

In respect of partnership business, Mr. Patel claimed that the foreign exchange contracts were negotiated by the defendant. He said that the originals of all foreign exchange contracts were signed by him and returned to the bank. The duplicates were kept by the defendant. He said the defendant monitored the foreign exchange requirement. When confronted with some documents (A77A to F), Mr. Patel was not able to explain why in those instances someone else was monitoring the situation. Mr. Patel was also unable to explain satisfactorily why he possessed the foreign exchange contracts (duplicate) of 1978 and not the other years. Mr. Patel claimed that separate foreign exchange contracts were negotiated in respect of the plaintiffs' own business. There was no mixing of the two kinds of foreign exchange contracts. Mr. Patel admitted that the foreign exchange contracts relating to the plaintiffs' own business have not been produced as they are irrelevant; but the plaintiffs would produce them if ordered by the Court.

Mr. Patel agreed that if he produced all foreign exchange contract files, the defendant's auditors could show which foreign exchange contract was set off against which rubber and latex transaction.

(d) **Invoice books - general export.**

The defendant is not pursuing this particular item.

(e) **Plaintiffs' stock books/records showing inventory.**

Mr. Patel initially said, as he has done in his affidavit, that the plaintiffs bought and sold FOB. After being shown documents on stocks, he admitted that non-FOB transactions were done though not frequently. B60, B61 and B62 show the stock position of commodities of the plaintiffs as at the end of December 1978, 1979 and 1980 respectively. A37, A38 and A39 also show stock balances as on 1 January 1977, 1978 and 1979 respectively.

The following questions and answers are pertinent:

Put: Not correct that you only dealt on FOB and not physical stock?

A: There were one thousand and one transactions.

Later Patel explained:

Majority were transit stocks. Some could be physical stocks in Singapore.

Q: Your auditors will only approve 8175, 8174 and 8175 (i.e., A37, A38 and A39) with proper supporting documents.

A: Yes.

Then Patel clarified:

Maybe they were written on a paper or exercise book.

As the amounts shown on the documents run into hundreds of thousands and even millions of dollars, it is hard to believe that those accounts shown in B60, B61 and A37, A38 and A39 could be drawn up without proper supporting documents, i.e., stock books. Even the quantities shown in PB 77 (Vol I) are also large. Mr. Patel admitted having stored cocoa and some insignificant amount of other goods with Yew Lian (Pte) Ltd.

Mr. Patel tried to explain that the above documents (i.e., B60, B61, B62, A37, A38 and A39) could refer to goods in transit. If that were so there must be records maintained of goods in transit; otherwise how could the auditors check whether the balances shown in B60, B61, B62, A37, A38 and A39 were correct. But there was no goods-in-transit record. Mr. Patel agreed that if he produced the stock books, he could tell whether a particular lot of goods was sold to the defendant or to someone else.

(f) **Local sales bill files in respect of rubber and latex.**

The plaintiffs assert that they themselves did not engage in local sales of rubber and latex (A79). When confronted with A81 and A82, Mr. Patel admitted that the plaintiffs themselves (apart from partnership business) did engage in local sales of rubber and that there must be in existence local bill files.

In this connection, I must refer to an exchange of correspondence between the solicitors for the two parties. On 5 October 1988, the defendant's solicitors wrote to the plaintiffs' solicitors spelling out clearly what the defendant wanted under this category:

On p. 13 of the said affidavit, Mr. Patel seems to be saying that the local sales bill files for the period 1976 to 1980 in respect of rubber and latex were understood to be a reference to sales by your clients to ours. Our request was not restricted to such sales but to all sales by your clients. We believe that this is fairly clear from our letter of 23 August. In any event, please let us know if your clients have sales files relating to **their sales to other clients,** and, if so, whether they are prepared to disclose the same. (Emphasis added)

On 6 October 1988, the plaintiffs' solicitors replied, *inter alia*:

... In fact your client is aware that our clients did not engage in the local sales of rubber and latex and having taken instructions specifically from our clients this morning our clients confirm to the best of their recollection that they have not engaged in local sales of rubber and latex.

This reply which the plaintiffs instructed their solicitors to give is clearly false.

(g) **Claims received files in respect of rubber and latex.**

Very little was raised in cross-examination relating to these files. PB65 (Vol II) shows that claims had been paid. What the defendant wants are the basic documents as shown in A1 to A8, supporting each and every one of those payments. The plaintiffs said that the files are not in their possession.

(h) **Rubber hedging contracts**

Mr. Patel admitted that the plaintiffs have not disclosed rubber hedging contracts relating to the plaintiffs' own business; however, if ordered, the plaintiffs would produce those contracts.

Mr. Patel said that the plaintiffs' own transactions could be distinguished from those of the partnership by the name of the broker. He said that the plaintiffs only dealt with Peat & Lewis. Two settlement statements of Union Rubber Brokers (Pte) Ltd. were produced to Mr. Patel by Counsel for the defendant and they show that two accounts were maintained by the plaintiffs with Union Rubber Brokers (Pte) Ltd. Mr. Patel denied the suggestion of Mr. Shunmuggam that one account was for the plaintiffs' own account and the other was for the partnership. In re-examination, Mr. Patel explained that both accounts were for the partnership, one for speculation and the other for hedging. The questions and answers in this regard are pertinent:

Q: The speculation account caters to cases where you did not intend to take up transhipment?

A: Yes. Such speculation business is common.

Q: What is the position with regard to hedging contracts?

A: We buy paper contracts for the required rubber but may not take it up.

Q: This is normal commercial practice?

A: Yes.

All I wish to comment is that the distinction between the two is rather fine.

Law

I will now turn to deal with the law. Under a general order of Court for discovery, a party is obliged to make discovery of all documents relevant to the matters in question in the action. What are the matters in question would depend on the pleadings. A document relates to the matter in question in the action if it contains information which may - not which must - either directly or indirectly enable the party requiring the discovery either to advance his own case or to damage the case of his adversary or which may fairly lead to a train of inquiry may have either of those two consequences: see *Compagnie Financiers du Pacifigue v. Peruvian Guano Co.* [1882] 11 QBD 55 at 62. Documents relate to matters in question in the action so long as they are likely to throw light on the case: see *Merchants' & Manufacturers' Insurance Co. Ltd. v. Davies* [1938] 1 KB 196 at 210.

Rule 16(1) of the Rules of the Supreme Court gives the Court a general power to enforce compliance with the requirements of the rules or orders for discovery, inspection and production of documents. If any part who is required by the Rules of the Supreme Court or by any order made under them, to make discovery of documents or to produce any documents for the purpose of inspection or any other purpose, fails to comply with any provision of the Rules or with that order, the Court may make such order as it thinks just, including in particular an order that the action be dismissed or an order that the defence be struck out and judgment entered accordingly.

Halsbury's Laws (4th Edn.) Vol 13 at para. 34 further elaborates on this point as follows:

> The power to dismiss an action is optional, not obligatory and should not be exercised unless the Court is satisfied that the plaintiff is endeavouring to avoid giving the discovery and not where the omission or neglect to comply with the order is not a culpable one, for instance if it is due to loss of memory or illness ...

In *Danvillier v. Myers* [1833] WN 58, the plaintiff was required by an order of Court to produce certain books. They were not produced on the expiry of the specified date. Accordingly, a summons was taken out by the defendant to dismiss the action. The plaintiff produced some books with an affidavit intended to show that they were the books referred to Chitty J, considering that the affidavit was insufficient and that the plaintiff was wilfully withholding information, dismissed the action. On appeal the Appeal Court held that as "fair discovery had not been made and that the plaintiff was keeping back documents which he ought to discover" the appeal had to be dismissed. It should be noted that the failure to comply in *Danvillier* did not even relate to an "unless" order.

The effect of an "unless" order is explained in these terms in para. 24/16/1 of the *White Book* (1988 Edn.):

> An "unless" order spells out the consequences of failure to comply with its terms, and disobedience to such an order is likely to be held to be contumelious behaviour resulting in the dismissal of the action or striking out of the defence, and, in the case of dismissal of the action, may prevent the plaintiff from issuing a second writ notwithstanding that the limitation period has not expired.

Scope of "Unless" Order of 31 August 1987

At the hearing of the defendant's application that the plaintiffs furnished a further and better list of documents the arguments centred on whether the defendant was entitled to the production by the plaintiffs of the primary accounting documents. The plaintiffs appeared to be prepared only to disclose the primary accounting documents relating to the June 1980 balance sheets which the defendant had qualified but not the primary accounting documents of earlier years. In the then submission of the defendant, the cases *Compagnie Financiere du Pacifique v. Peruvian Guano Co*. [1882] 11 QBD 55 and *Kent Coal Concessions v. Duguid* [1910] 1 KB 904 were referred to. Notwithstanding the arguments of the plaintiffs that their claims were in fact based on an account stated (expect in respect of the balance sheets which the defendant quatified), the Court granted the application of the defendant. The Court ordered that "the plaintiffs do comply with the order of Court dated 20 January 1984 by filing a further list of documents ... by 28 September 1987. It is clearly implicit in this order of 31 August 1987 that the Court was not satisfied that the plaintiffs had made full and fair discovery in their list of 27 August 1987: thus the necessity for that order.

Findings

In the light of the oral examination of Mr. Patel, it is clear, on Mr. Patel's own admission, that the plaintiffs have not disclosed the documents listed under categories (a), (b), (c), (f) and (h) mentioned above, in so far as those documents relate to what the plaintiffs allege to be their own business. In the letters exchanged between the parties prior to the hearing before me, the plaintiffs have never claimed that the documents have not been disclosed because they do not relate to the partnership transactions. The plaintiffs' answers have been either that the documents are not in the possession of the plaintiffs and/or that they are in the possession of the defendant. Now in relation to category (a) documents what the defendant has asked for also include local purchase contract files in respect of general goods. How could they be with the defendant? Further, the correspondence relating to category (f) documents show quite clearly the kind of stand taken by the plaintiffs. Even after the defendant had pointed out clearly what he wanted (through his solicitors' letter of 5 October 1988), the plaintiffs' reply, as late as 6 October 1988, was that they did not themselves engage in local sales of rubber and latex, and **not** that such documents were irrelevant to the case.

As regards category (h) documents, I see that what the defendant asked for in his solicitor's letter of 23 August 1988 is "rubber hedging contracts which **plaintiffs entered into with all brokers** between 1976 - 1980". The answer of the plaintiffs is "not in the possession of the plaintiffs. In fact in the possession of the defendant". Now Mr. Patel admitted that the plaintiffs have not disclosed rubber hedging contracts relating to the plaintiffs' own business. In this connection I would add that as early as on 11 May 1982, the defendant in an affidavit filed herein on that date stated that the partnership between the plaintiffs and the defendant was limited to physical rubber trading and did not include paper transactions. The defendant further elaborated: "The paper transactions were carried out by me for the plaintiffs and Manilal, Penang but always on their instructions. Paper transactions are purely speculative in nature and were done by each party for their separate account ..." In preparation of the accounts, the plaintiffs have included all the paper contracts in the partnership accounts which they should not have done. In view of this, and noting that the letter of 23 August 1988 has made the position quite plain, I am of the opinion that there is clearly withholding of category (h) documents on the part of the plaintiffs.

As I have stated above, what documents a party is obliged to disclose would depend on the facts and the issues raised in the pleadings. And having regard to the pleadings and the affidavit filed herein there are quite clearly a dispute as to the terms of the partnership arrangements and also a dispute on which transactions are partnership transactions and which are not. In these circumstances the documents, allegedly relating to the plaintiffs' own business, are in issue and should be disclosed. After all, every transaction in rubber and latex was entered into in the name of the plaintiffs, irrespective of whether that transaction was for partnership account or for the plaintiffs' own account. In any event, and as mentioned earlier, irrelevancy has never been raised by the plaintiffs for failing to disclose until the hearing before me. Similarly, the need to impose conditions for disclosure has also never been mentioned before.

Even giving the plaintiffs the maximum benefit that there just might be that possibility that they were really mistaken and were under the erroneous impression that they need not disclose the documents relating to their own transactions, there cannot be any doubt, for the reasons mentioned above, as regards categories (a), (f) and (h) documents.

There remains one other category of documents - category (e). I am unable to accept the evidence of Mr. Patel that there was no stock books/accounts. As stated above, the documents identified by the defendant have shown the existence of stocks. Even in the plaintiffs' reply and defence to counterclaim, there are the items "PSA duties" and "forwarding charges". I find it hard to believe that the stock record could have been written on scraps of paper and thrown away. The plaintiffs were in big business. Everything seems to indicate that they have a proper system of recording. He also said they could be written on exercise books: then where are the exercise books? On the authority of *Kent Coal Concession*, they should be produced or an account given. Instead of giving a truthful account, the plaintiffs said that they did not have stock books/records as they "bought and sold FOB".

Under the order of 31 August 1987, the plaintiffs must make full discovery. I cannot accept the suggestion of Counsel for the plaintiffs that just because the order for discovery is of a general character, the duty of the plaintiffs to disclose all relevant documents is in any way lessened. Whether a document is explicitly identified in the order is quite immaterial. The crucial factor is relevancy and this point was never raised by the plaintiffs until the hearing before me. Though the plaintiffs have filed two supplementary lists pursuant to the order, for the reasons I have above, the plaintiffs have not made the necessary full and fair discovery, particulary as regards the documents in categories (a), (e), (f) and (h). Thus there is non-compliance with the order. If this omission had not been deliberate then I find that it arose out of gross negligence on the part of the plaintiffs such as to amount to wilfulness.

Counsel for the defendant has taken pains to impress upon this Court that nothing in his criticism of the plaintiffs should be taken as criticism of the plaintiffs' solicitors, who had undoubtedly prepared the lists and the affidavits on the instructions of clients. I share the sentiments of the defendant's Counsel that the plaintiffs' solicitors were not at fault.

In the result, I hold that there has been non-compliance with the order of 31 August 1987 and by virtue of the terms of that order, I declare that the action of the plaintiffs be dismissed. The plaintiffs shall bear the costs of this application.

Also found at [1990] 1 CLJ 623